Before H. M. Privy Council.

JUDGE AYLWIN'S

OPINION

In a cause between

THE BANK OF BRITISH NORTH AMERICA,

Appellant.

AND

ANGELIQUE CUVILLIER, ET AL.,

Respondents.

JOHN LOVELL, PRINTER ST. NICHOLAS STREET, MONTREAL.

Province of Canada, LOWER CANADA, 29 VICT. } IN THE QUEEN'S BENCH,

APPEAL SIDE.

THE BANK OF BRITISH NORTH AMERICA,

Appellant.

AND

ANGELIQUE CUVILLIER, ET AL.,

Respondents.

JUDGE AYLWIN'S OPINION.

The Bank was the party Plaintiff before the Court below. The Defendants were Maurice Cuvillier described as "late of the City of Montreal, in the District of Montreal, Merchant, at present residing "at Belleville, in that part of the Province of Canada heretofore constituting the Province of Upper "Canada, Dame Marie Claire Perrault, of the said City of Montreal, widow of the late Honorable "Austin Cuvillier, in his lifetime of the said City, Merchant, Angelique Cuvillier, of the said City of "Montreal, wife of Alexander M. Delisle, of the said City, Esquire, and the said Alexander M. "Delisle, as the husband of the said Angelique Cuvillier, Mary Anne Cuvillier of the City of Quebec, "in the District of Quebec, wife of George Burns Symes, of the said City of Quebec, Esquire, *non "commune en biens* with him, and the said George Burns Symes, as the husband of the said Mary Anne "Cuvillier, and Luce Cuvillier, of the said City of Montreal, Spinster, of the full age of majority, "*fille majeure et usante de ses droits.*"

On the 20th April, 1858, Maurice Cuvillier having given a *Cognovit actionem*, or confession of judgment, it was entered up and recorded against him, in the Superior Court at Montreal, but the action was dismissed, in so far as respects Angelique Cuvillier, Mary Anne Cuvillier, and Luce Cuvillier, three of the Defendants, who are now Respondents before the Court. Dame Marie Claire Perrault died during the pendency of the suit, and proceedings were discontinued *quoad* her.

The present Appeal is brought by the Bank from the judgment of dismissal.

The liability of the Respondents for which, the Bank contends, rests upon an instrument executed at Montreal, on the 26th July, 1849, before T. Doucet and his Colleague, Public Notaries, *inter partes* to wit, the said Maurice Cuvillier, of the first part, the said late Dame Marie Claire Perrault, Angelique Cuvillier, wife of Alexander M. Delisle, Mary Anne Cuvillier, wife of George Burns Symes, and the said Luce Cuvillier of the second part, the Bank of Montreal, of the third part, and the said Bank of British North America, now Appellant, of the fourth part.

Upon the true construction of this instrument the present appeal must depend.

The parties to it begin by declaring "that the said late Austin Cuvillier, (the Honorable Austin "Cuvillier,) his son Austin Cuvillier of the City of Montreal, Merchant, now absent in England, and "the said Maurice Cuvillier carried on trade and commerce, at this City, upon an extensive scale, under "the firm of 'Cuvillier and Sons' until the eleventh day of the present month of July when the said "firm was dissolved by the death of the said late Austin Cuvillier."

"That the said Maurice Cuvillier hath, *since the death of the said late Austin Cuvillier, carried on and proposes to carry on trade and commerce in this City and elsewhere.*"

"That to enable him to do so, *and to meet the engagements of the said late firm of Cuvillier & Sons, he "will require discounts and pecuniary assistance to a considerable extent* from the said parties of the third and "fourth parts respectively, and that with a view of making the said parties of the third and fourth "parts *perfectly secure*, with respect to any *debts which now or hereafter may be due to them* respectively by "the said Maurice Cuvillier, and with respect to the *present and future responsibilities of the said Maurice "Cuvillier to the said parties of the third and fourth parts respectively, the said parties of the second part are "willing to become security to and in favor of the said parties of the third and fourth parts.*"

After this recital the instrument proceeds as follows: "Now therefore, the said parties hereto "of the second part do hereby make *themselves jointly and severally liable to and in favor of the said parties "hereto* of the third and fourth parts respectively, they thereof accepting, *for all debts heretofore contracted, "or that may hereafter be contracted to and in favor* of the parties of the third and fourth parts respectively, "*by the said Maurice Cuvillier, and* GENERALLY *for* ALL *the present and* FUTURE LIABILITIES *of the said Mau-"rice Cuvillier, towards the parties of the third and fourth parts respectively, whether as maker or drawer, endorser "or acceptor of negociable paper or otherwise, and whether resulting from discounts, pecuniary advances* OR ANY "OTHER CAUSE WHATEVER, the said parties hereto of the second part, hereby jointly and severally pro-"mising and obliging themselves to meet and pay the said present and FUTURE DEBTS and liabilities of the "said Maurice Cuvillier, as if THEY WERE JOINTLY AND SEVERALLY THE PRINCIPAL DEBTORS THEREOF, "and expressly renouncing the *benefit of the exceptions of division and discussion and* ALL OTHER SUCH "EXCEPTIONS *with respect to the said debts and* LIABILITIES *and the* OBLIGATIONS *so hereby contracted by "them.*"

The Bank, in its Declaration, has counted against the Defendants, upon eight pieces of negotiable paper, namely:

1st.—16th October, 1854, a Bill of Exchange for £625 Currency, drawn at New York, by Charles H. Castle on Maurice Cuvillier, at Montreal, to order, at ten days sight, accepted on the 16th October, and duly protested for non-payment, at the instance of the Bank as holder, on the 31st October, 1854.

2nd.—19th October, 1854, a Bill of Exchange for two thousand five hundred dollars equivalent to £625 Currency, drawn at New York, by Charles H. Castle on Maurice Cuvillier, at Montreal, to order, at ten days sight, accepted on the 23rd October, and duly protested for non-payment, at the instance of the Bank as holder, on the 4th November, 1854.

3rd.—21st October, 1854, a Bill of Exchange for £625 Currency, drawn at New York, by Charles H. Castle on Maurice Cuvillier, at Montreal, to order, at ten days sight, accepted on the 24th October, 1854, and duly protested for non-payment, at the instance of the Bank as holder on the 6th November, 1854.

4th.—24th October, 1854, a Bill of Exchange for £750 Currency, drawn at New York, by Charles H. Castle on Maurice Cuvillier, at Montreal, to order, at ten days sight, accepted on the 26th October, 1854, and duly protested for non-payment at the instance of the Bank as holder, on the 8th November, 1854.

5th.—23rd October, 1854, a Bill of Exchange or draft for £400 Currency, drawn at Montreal, by the firm of A. Cuvillier & Company, then composed of Austin Cuvillier, the said Maurice Cuvillier and Edward Chaplin, on Messrs. Henry Bull & Company, Belleville, Upper Canada, payable to the order of Maurice Cuvillier, at ten days sight, discounted by the Bank on the 23rd October aforesaid *" at the special instance and request of the said Maurice Cuvillier and paid to him,* protested for non acceptance on the 3rd November, 1854, and for non-payment on the 10th November, at the instance of the Bank as holder, with due notice given to Maurice Cuvillier as endorser.

6th.—23rd October, 1854, a draft for £200 Currency, drawn at Montreal, by the said firm of A. Cuvillier & Company on the said firm of Henry Bull & Company, at Belleville, in Upper Canada, payable to the order of Maurice Cuvillier at twenty days sight, discounted by the Bank on the said 23rd October, at the like special instance and request, and paid to the said Maurice Cuvillier, protested for non-acceptance on the 3rd November, and for non-payment on the 25th November, 1854, at the instance of the Bank as holder, with due notice given to Maurice Cuvillier as endorser.

7th—23rd October, 1854, a draft for £450 Currency, drawn at Montreal, by the said firm of A. Cuvillier & Company on the said firm of Henry Bull & Company, at Belleville aforesaid, payable to the order of Maurice Cuvillier at thirty days sight, discounted by the Bank, at the instance and request of, and paid to Maurice Cuvillier as aforesaid, protested for non-acceptance on the 5th November, 1854, and for non-payment on the 8th December following, at the instance of the Bank as holder, with due notice given to Maurice Cuvillier as endorser.

8th.—3rd September, 1854, a Promissory Note, made by Jerôme Grenier, for £176 14s. 6d. Currency, payable at four months, to Messrs. A. Cuvillier & Co., or order, at the Bank of Montreal, by them endorsed to the said Maurice Cuvillier, and by him to the Bank, protested for non-payment on the 11th January, 1855, with due notice given to Maurice Cuvillier as endorser.

For their defence to the action, the Defendants, Dame Marie Claire Perrault, the widow of the late Honorable Austin Cuvillier, Angelique Cuvillier, Mary Ann Cuvillier and Luce Cuvillier pleaded by *Exception peremptoire.*

1o. " *Que le dit acte de garantie ou de cautionnement du 26 Juillet,* 1849, *devant le dit Mtre. Doucet et " son confrère Notaires, est frappé de nullité absolue et ne les lie aucunement aux termes d'icelui comme cautions " solidaires du Défendeur Maurice Cuvillier pour le paiement des prétendues sommes reclamées par la Demande-" resse* (the Bank) *en sa déclaration.*"

2o. " Que si les Défendeurs sont devenus, par le dit acte de cautionnement du 26 Juillet, 1849, " cautions solidaires du Defendeur Maurice Cuvillier envers la Demanderesse (the Bank) ce ne pourrait " être *tout au plus* que pour le paiement des créances qu'aurait ou pourrait avoir la demanderesse contre " le Défendeur Maurice Cuvillier, soit comme tireur, endosseur ou accepteur sur traites, lettres de " change, billets négociables, soit comme *autrement débiteur,* et lesquels créances, eu autant que le dit " Maurice Cuvillier en serait devenu débiteur aux divers titres ci-dessus, *en autant que le dit Maurice " Cuvillier, en serait devenu debiteur aux divers titres,* ci-dessus, auraient pour source, cause, valeur, consi-" dérations ou objet SOIT LA LIQUIDATION OU LE REGLEMENT des DETTES et AFFAIRES DE LA CIDEVANT " SOCIÉTÉ COMMERCIALE DE CUVILLIER & SONS, COMPOSÉE DU DIT FEU L'HONORABLE AUSTIN CUVILLIER, " et DES DITS AUSTIN CUVILLIER, JUNIOR, et MAURICE CUVILLIER, soit le COMMERCE INDIVIDUEL du dit " Maurice Cuvillier, c'est-à-dire TOUT COMMERCE QUE LE DIT MAURICE CUVILLIER FERAIT POUR SON SEUL " COMPTE et PROFIT INDIVIDUEL."

" Que par le dit acte de cautionnement les dits Defendeurs ne sont point devenus cautions " solidaires, pour le paiement de créances fondées sur traites, lettres de change, billets signés, endossés " ou acceptés par le dit Maurice Cuvillier ou sur autres titres et qui auraient pour source, cause, valeur, " considérations ou objet, *le commerce du dit Maurice Cuvillier fait en société avec d'autres,* ni pour le paie-" ment de créances fondées sur traites, lettres de change, billets signés, endossés ou acceptés *hors de son " commerce individuel, n'ayant pas pour cause ou objet un commerce individuel de sa part, et n'étant à son égard " individuel que des obligations ou dettes* D'UN CARACTÈRE CIVIL, NON D'UN CARACTÈRE COMMERCIAL."

" Que le dit Maurice Cuvillier, à la connaissance du public en Canada et ailleurs et *de la Demanderesse en particulier,* a *immédiatement ou presqu'immédiatement* après la date du dit acte du 26 Juillet, " 1849, cessé de faire commerce pour son compte et profit individuel soit à Montréal, soit ailleurs, que " même depuis le printems, 1851, jusque vers le 1er Mai, 1852, le dit Maurice Cuvillier à la connaissance " du public à Montreal et ailleurs, et à la *connaissance particulière* de la Demanderesse, a commercé en " société au dit lieu de Montréal *avec Austin Cuvillier, junior,* SON FRÈRE, sous la raison sociale de ' A. " Cuvillier & Co.', qu'ensuite depuis le commencement de Mai, 1852, jusqu'à aujourd'hui, le dit Maurice " Cuvillier, à la connaissance du public à Montréal et ailleurs et *de la Demanderesse en particulier,* a com-" mercé en société et commerce encore en société au dit lieu de Montréal avec le dit Austin Cuvillier, " junior, son frère, et Edward Chaplin, sous la raison sociale de ' A. Cuvillier & Co.', qu'enfin depuis le " dit acte du 26 Juillet, 1849, le dit Maurice Cuvillier *n'a fait aucun commerce particulier pour son compte " et profit individuel en la Cité de Montréal ou ailleurs.*

" Que les dites traites ou lettres de change mentionnées, en la Déclaration, tirées par le dit " Charles H. Castle à New York sur le dit Maurice Cuvillier, et par ce dernier acceptées, n'ont eté " ainsi tirées sur le dit Maurice Cuvillier et par lui acceptées à la connaissance particulière de la " Demanderesse, ou des personnes gérant ou administrant ses affaires, que pour le *compte, profit l'intérêt " et les affaires de la dite société commerciale du dit Maurice Cuvillier avec son dit frère* Austin Cuvillier, " junior, et le dit Edward Chaplin."

" Que le dit Maurice Cuvillier en ayant ainsi permis au dit Castle de tirer sur lui et en ayant " accepté icelles dites traites et lettres de change en dernier lieu mentionnées, N'A ÉTÉ QU'UN PRÊTE-" NOM POUR ET AU LIEU DE SA DITE SOCIÉTÉ COMMERCIALE AVEC SON DIT FRÈRE ET LE DIT EDWARD " CHAPLIN."

" Que les dites traites ou lettres de change, ainsi tirées par le dit Castle et escomptées à New " York par la branche ou l'agence de la Demanderesse, avant acceptation d'icelles par le dit Maurice " Cuvillier, ont ainsi été tirées et escomptées sur une lettre de crédit ou reconnaissance par écrit con-" sentie et signée par le dit Maurice Cuvillier à la Demanderesse à Montréal par laquelle un crédit à " un montant très considérable avait été ouvert en faveur du dit Castle et par laquelle le dit Maurice " Cuvillier s'engageait d'honorer et accepter les traites ou lettres de change que tirerait le dit Castle " sur le dit Maurice Cuvillier, et que la dite branche ou agence de la Demanderesse escompterait à " New York. Qu'en ayant ainsi signé, consenti et delivré la dite lettre de crédit ou reconnaissance " par écrit à la Demanderesse au dit lieu de Montréal le dit Maurice Cuvillier (et ce à la connaissance " de la Demanderesse *n'a agi que pour le compte et profit de sa dite société* avec son dit frère *et le dit Edward " Chaplin,* ET N'A ÉTÉ QU'UN PRÊTE NOM POUR ICELLE SOCIÉTÉ."

" Que les dites lettres de change ou traites mentionnées en cette cause tirées par le dit Castle " et escomptées à New York par la dite branche ou l'agence de la Demanderesse, les montants réalisés " par leur escompte ont fait *comme autres transactions de ce genre l'objet de comptes en débit et crédit entre le " dit Castle et la dite société du dit Maurice Cuvillier avec son dit frère et le dit Edward Chaplin et non entre " le dit Castle et le dit Maurice Cuvillier, attendu que les dites traites ou lettre de change* NE CONCERNAIENT " LE DIT MAURICE CUVILLIER QUE NOMINALEMENT, mais concernaient en réalité la dite société avec son " dit frère et le dit Chaplin, *dans les livres de laquelle société figurent toutes transactions de ce genre,* ET CE A " LA CONNAISSANCE DE LA DEMANDERESSE OU DES PERSONNES GÉRANT SES AFFAIRES."

" Qu'ainsi les dites traites, &c., tirées par le dit Castle ayant été tirées sur le dit Maurice Cuvil-

" lier et acceptées par ce dernier et l'escompte ou le produit d'icelles n'ayant été appliqué que pour " le compte, le profit, l'intérêt et les affaires de la dite société du dit Maurice Cuvillier avec son frère et " NON POUR LA LIQUIDATION ET LE RÈGLEMENT DES AFFAIRES DE LA DITE CI-DEVANT SOCIÉTÉ DE " CUVILLIER AND SONS, DANS LAQUELLE ÉTAIT ASSOCIÉ LE DIT FEU HONORABLE AUSTIN CUVILLIER, NON " PLUS QUE POUR LE COMMERCE INDIVIDUEL OU A L'OCCASION D'AUCUN COMMERCE INDIVIDUEL DU " DIT MAURICE CUVILLIER, les dits Défendeurs ne sont point devenus et ne se trouvent point en vertu " du dit acte de Cautionnement du 26 Juillet, 1849, cautions solidaires du Défendeur Maurice Cuvillier " envers la Demanderesse à raison de l'acceptation par le dit Maurice Cuvillier d'icelles dites traites " tirées par le dit Castle et partant ne sont point tenus envers la Demanderesse au paiement d'icelles " dites dernières traites ou lettres de change."

" Qu'en *supposant* que la Demanderesse ou les personnes gérant et administrant ses affaires n'eus- " sent pas connu que le dit Maurice Cuvillier en consentant à la Demanderesse la dite lettre de crédit " en faveur du dit Castle et en permettant à ce dernier de tirer sur lui et en acceptant les dites lettres " de change ou traites mentionnées en cette cause tirées sur lui par le dit Castle, *n'était que le prête-nom* " de sa dite société commerciale avec son dit frère et le dit Edward Chaplin, et *n'agissait que pour le* " *compte, le profit, et l'intérêt d'icelle dernière société*, les dits Défendeurs ne seraient même pas dans ce cas, " en vertu du dit acte du 26 Juillet, 1849, tenus et obligés comme cautions solidaires du Défendeur Mau- " rice Cuvillier en faveur de la Demanderesse à raison et par suite de l'acceptation par le dit Maurice " Cuvillier des dites traites ou lettres de change tirées par le dit Castle en autant que la valeur, cause " ou considération d'icelles dites traites ou lettres de change non plus que la cause ou la considération " de l'acceptation d'icelle par le dit Maurice Cuvillier *ne concernaient ni la liquidation ni le règlement des* " *affaires de la dite ci-devant société de 'Cuvillier & Sons,' ni aucun commerce individuel du dit Maurice Cu-* " *villier*, et attendu que l'acceptation d'icelles traites ou lettres de change par le dit Maurice Cuvillier " ne CONSTITUERAIT A SON ÉGARD QUE DES CRÉANCES D'UN CARACTÈRE PUREMENT CIVIL ET NON COM- " MERCIAL ET NON LIÉ AVEC LE RÈGLEMENT ET LA LIQUIDATION DES DITES AFFAIRES DE LA DITE CI- " DEVANT SOCIÉTÉ DE CUVILLIER & SONS."

" Qu'ils ne sont nullement tenus et obligés comme cautions solidaires du Défendeur Maurice " Cuvillier, au paiement des dites traites ou lettres de change mentionnées en cette cause tirées par le " dit A. Cuvillier & Co. sur Henry Bull & Co. payables à l'ordre du dit Maurice Cuvillier et endossées " par ce dernier, ni au paiement du billet du dit Jérôme Grenier en faveur de A. Cuvillier & Co., en- " dossé par ces derniers et ensuite endossé par le dit Maurice Cuvillier, attendu *que la valeur, cause ou* " *considération des dites traites et du dit billet qui viennent d'être mentionnés en dernier lieu non* plus que la valeur, " cause ou considération du *dit endossement par le dit Maurice Cuvillier sur icelles dernières traites sur icelui* " *dernier billet ne concernaient* ni la liquidation *et le règlement des dites affaires de la dite ci-devant société de* " *Cuvillier & Sons ni aucun commerce individuel du dit Maurice Cuvillier, mais concernaient les affaires de la* " *dite société de A. Cuvillier & Co., et ce à la connaissance de la Demanderesse.*

" Que d'ailleurs en supposant qu'elles n'eussent pas concerné icelle dernière société, l'endosse- " ment par le dit Maurice Cuvillier sur icelles dernières traites et sur icelui billet constituerait *à l'égard* " *du dit Maurice Cuvillier une obligation nullement liée à aucun commerce individuel du dit Maurice Cuvillier,* " *ni au règlement des affaires de la dite ci-devant société de Cuvillier & Sons et partant ne tombant pas sous* " *l'effet du dit acte de cautionnement du dit 26 Juillet*, 1849.

" Que les produits ou montants réalisés par les escomptes des dites traites ou lettres de change " et billet mentionnés en cette cause n'ont été ni pour le règlement et la liquidation des affaires de la " dite ci-devant société de Cuvillier & Sons, ni pour l'égard d'aucun commerce individuel du dit Mau- " rice Cuvillier, mais qu'ils l'ont été pour *le compte, le profit et l'intérêt de la dite société A. Cuvillier & Co.* " *dans les livres de laquelle ils figurent et que tout ce que dessus a eu lieu à la connaissance pleine et entière de la* " *dite Demanderesse, ou des personnes gérant ses affaires.*"

" Qu'attendu ce que dessus les dits Défendeurs ne sont nullement tenues et obligés au paiement " d'aucune des dites sommes reclamées par la Demanderesse, icelles dites sommes ou prétendues créances ne tombent point sous l'effet du cautionnement que comporte le dit acte du 26 Juillet, 1849."

Issue having been joined and evidence adduced by the parties, the judgment now under review was pronounced on the 30th of April, 1858.

Maurice Cuvillier, though one of the Defendants, was examined as a witness on behalf of his Co-defendants although his testimony was objected to by the Bank, a motion was made to overrule this testimony, and to strike it from the fyles, and the judgment begins by disposing of this motion which is rejected.

The *Considerants* as given in the Court below are " that the said Plaintiff hath failed to establish " the material allegations of the declaration, and particularly that the said Defendants Angelique " Cuvillier, Mary Anne Cuvillier, and the said Luce Cuvillier, are liable in manner and form as " complained of; then, " that it is fully established in evidence by the said Defendants, that the bills " or drafts and promissory note sued on in this Cause, were not given by the said Maurice Cuvillier to " the said Plaintiff in this cause, in the prosecution of any business carried on by the said Maurice " Cuvillier either in *winding up the business of the late firm of Cuvillier & Sons, or in carrying on any busi-* " *ness of trade and commerce in his own name*, further that the said Defendants have fully established " by legal and sufficient evidence that the drafts or bills of exchange firstly, secondly, thirdly and " fourthly sued on, &c., were accepted by the said Maurice Cuvillier, *and were discounted by the said* " *Plaintiff for the benefit of the firm of A. Cuvillier & Co.*, of which firm the said Maurice Cuvillier " was a member, *and this to the knowledge of the said Plaintiff*;" then " that the said Defendants are " not liable to the said Plaintiff, as the surety of the said Maurice Cuvillier, as the said drafts or bills of " exchange *were not discounted by the said Plaintiff for the said Maurice Cuvillier, in the prosecution of any* " *separate trade or commerce either in his own name or in winding up the affairs of the late firm of Cuvillier* " *& Sons.*"

Next, " that the several drafts or bills of exchange drawn by the said firm of A. Cuvillier & Co. " on the firm of Henry Bull & Co. of Belleville, in favor of the said Maurice Cuvillier, and discounted " by the said Plaintiff, were in point of fact *discounted for the benefit of the said firm of A. Cuvillier & Co.* " as the said Maurice Cuvillier *the payee and endorser of the said bills*, was at the time of the drawing and " endorsing the said bills, *a member of the said firms of A. Cuvillier & Co. and of Henry Bull & Co., of* " *Belleville, to the knowledge of the said Plaintiff*;" further, " that the said promissory note made and signed " by the said Jerôme Grenier in favor of the firm of A. Cuvillier & Co., and endorsed by the said Mau- " rice Cuvillier, *was also discounted for the benefit of the said firm of A. Cuvillier & Co., of which firm, the* " *said Maurice Cuvillier was at the same time a member, and this to the knowledge of the said Plaintiff*;" further, " that the said last mentioned bills of exchange and promissory note were not *discounted for the said* " *Maurice Cuvillier*, in the carrying on *of any separate trade or business or in the winding up of the affairs* " *of the late firm of Cuvillier & Sons*, and by reason thereof no action in law hath accrued to the said " Plaintiff to compel the payment thereof from the said Defendants as the sureties of the said Maurice " Cuvillier, under and by virtue of the Deed or Bond of Suretyship, set out in the Declaration of the " said Plaintiff," whereupon " the Court doth maintain the exception of the said Angelique Cuvillier, " Mary Anne Cuvillier and the said Luce Cuvillier, Defendants, as pleaded by them to the action of the " said Plaintiff, and doth as regards the said Angelique Cuvillier, Mary Anne Cuvillier and the said " Luce Cuvillier, dismiss the said action with costs."

The judgment then proceeds to condemn Maurice Cuvillier upon his Confession, to pay to the Plaintiff the sum of £4107 12s. Currency, with interest and costs of suit, as prayed for.

In examining this judgment, the first point which presents itself is, the admission of Maurice Cuvillier, as a witness, for the Defendants, he being a Co-defendant, and no judgment having been entered up as against him at the time of his examination. In support of this ruling the case of

Worrall vs. Jones, 7 Bingham 396, and Pipe vs. Steele, 2. Queen's Bench Reports 784, were cited by the Respondents, but in these cases, the witness had suffered a judgment by default, and the testimony was tendered by the Plaintiff and not as in this case by Co-defendants. The general rule which excludes the evidence of a party to the record, is the rule to be followed in this case, 1 Greenleaf on Evidence §329. 330. It seems to be admitted that the judgment is in this respect faulty, but it is said that the complexion of the case is not changed by the rejection of the evidence of Maurice Cuvillier.

Before proceeding further, it is to be noticed that the Defendants have not alleged in their exception, that the business of the firm of Cuvillier & Sons was ever wound up, or that the liability of the Defendants under the Deed, was ever discharged or that it never attached at all. Now in express terms, the Defendants became liable "for all debts heretofore contracted," and generally for all the *present* and future *liabilities* of the said Maurice Cuvillier.

The liability of the Defendants was undertaken for "*that the said Maurice Cuvillier hath, since the* "*death of the said late Austin Cuvillier, carried on* and proposes to carry on trade and commerce in this "City and elsewhere." Their object was "to enable him to do so, *and to meet the engagements of the said* "*late firm of Cuvillier & Sons,*" for which purpose "*he will require discounts and pecuniary assistance to a* "*considerable extent from the said parties of the third and fourth parts respectively.*" In what relation do the parties, Defendants, stand towards each other? The firm of Cuvillier & Sons, composed of the late Honorable Austin Cuvillier, and of his sons Austin Cuvillier, the younger, and Maurice Cuvillier, had been dissolved on the 11th July, 1849, by the death of the father. On the 26th of the same month of July, the deed in question is signed, in the absence of Austin Cuvillier, the younger, in England, by Dame Marie Claire Perrault, the widow of the deceased, presumptively *commune en biens* with her husband, and her three daughters, his natural heirs. The Defendants had an interest in the liquidation of the affairs of the firm of Cuvillier & Sons, manifestly, and Austin Cuvillier, the younger, who was examined, as a witness for the Defendants, swears that "after the death of the late Honorable Austin "Cuvillier, in the year 1849, *Maurice Cuvillier was appointed by the family Cuvillier to wind up his affairs,* "at the same time with his own business."

Maurice Cuvillier, as the Defendants' witness, says, "I am positive that I commenced winding "up the said estate previous to the execution of the deed filed in this cause by the Plaintiffs as their "Exhibit number 2, (the deed of the 6th July, 1849). I ceased to wind up the said estate at the time "mentioned (about November, 1852,) in consequence of its settlement being completed *by the purchase* "*by my brother Austin and myself from the other heirs of my late father of all that remained due to it.*" I think it right at the outset to notice the marked distinction between the position of the Defendants, and that of ordinary sureties under the usual *cautionnement*, although subsequently, it will have to be discussed more at length. Maurice Cuvillier was their attorney or *mandataire*, and in undertaking for him, they undertook for themselves, in the management of the common business of all, and their joint interest.

"The account with Mr. Maurice Cuvillier was opened (at the Bank of British North America) in "July, 1849, and *continued up to the time of the failure* of Maurice Cuvillier." Evidence of David Davidson, the Cashier, a witness for the Defendants (Page 35 of the printed Record, line 16).

The case with reference to the four bills of exchange, drawn by Castle and discounted at New York, stands upon a different footing, from the drafts drawn by A. Cuvillier & Co. and the promissory note of Jerôme Grenier. The bill transaction is distinguishable from the others, in this important respect, that neither the name of A. Cuvillier & Co. nor of Bull & Co. appears upon the face of the paper, the acceptance being that of Maurice Cuvillier alone.

Upon the theory of the defence, it was for the Defendants to shew that this transaction did not come within the guarantee or *cautionnement* and to connect it with business foreign to the purposes of the deed, in order to exclude the liability set up against them by the Bank. Let it now be enquired, has this been done? The three letters or requisitions dated the 9th, 10th and 21st of October, 1854, explain the origin of the four bills drawn from New York, sued upon by the Bank, and now in question. It is to be noticed that the originals are printed forms, such as are in common use at the Bank with blanks which are filled up in writing, and that the concluding portion of the printed form "this "guarantee and obligation is intended to remain in force, &c.," is inapplicable to the position of Maurice Cuvillier when signing them. The applicant is Maurice Cuvillier and his request to the Bank is "to "order a credit to be lodged with the Manager of your Branch at New York in favor of C. H. Castle, "Esquire, same place, for the sum of 5000 dollars or £1250" (3000 dollars or £750, and 5000 dollars or £1250 respectively) which is followed by, "and I hereby engage to honor his draft on me for this "amount to be drawn before the 20th instant (the 28th instant and the 31st instant respectively,) "at ten days sight." Pursuant to these requisitions a credit is opened to Castle at New York, by the Bank, and the four bills drawn by Castle, on Maurice Cuvillier, are received in consequence. The deed of the 26th July, 1849, states "that the said Maurice Cuvillier hath since the death of the said "late Austin Cuvillier carried on and proposes to carry on trade and commerce in this city and *else-* "*where.*"

Mr. Davidson, the Cashier of the Bank, when examined by the Defendants as their own witness, "is asked, "Were you not informed by Maurice Cuvillier for what purpose the credits on New York "and, specially the proceeds of the drafts forming Plaintiff's Exhibits numbers 1, 2, 3, and 4 were to "be used, and if so state what that purpose was?" His answer is "Mr. Maurice Cuvillier applied for "these credits *in favour of his agent in New York*, as stated to me in connection with business, *which he* "*managed for Bull and Company* of Belleville. The Drafts sued upon, formed part of *a long series of* "*similar transactions* of which the foregoing was the only explanation. 'I remember to have received.'" The same witness says, "the account with Mr. Maurice Cuvillier, was opened in July, 1849, and "continued up to the time of the failure of Maurice Cuvillier." The Bank positively declined to have any transactions with A. Cuvillier and Company. "I am certain that I informed him (Maurice Cu-"villier) that in all the transactions with the Bank, the Bank depended upon the said warranty," the "deed of the 26th July, 1849. The *paper now sued upon would never have been discounted except in reliance* "*upon that security.*" "I recollect distinctly that I told Mr. Austin Cuvillier on more than one occasion, "that the Bank *would not transact any business with his firm.*"

In looking at these four bills in a commercial point of view, their value depended upon the ostensible parties to them, and in the whole process of their issue and negotiation, the party mainly interested and liable, is the individual Maurice Cuvillier the acceptor, upon the face of them. The Defendants have sought to shew, that the appearance of the bills was fictitious, that Maurice Cuvillier was merely a *prête-nom*, and that the party really interested, was the firm of A. Cuvillier & Co. From this plea of the Defendants it is to be inferred, that the resort to a feigned party, must exempt them from liability. But, admitting it to be the fact, that Maurice Cuvillier, purposely omitted the name of A. Cuvillier and Co. in order to procure a discount or pecuniary advance which would have been refused by the Bank, if the transaction had appeared in its true light, is the Bank to be made the victim of the deception? The Bank trusted Maurice Cuvillier upon the faith of the Defendants' deed, and his representation whether true or false bound them equally. The misappropriation of the credit, cannot prejudice the Bank. It is to be ascertained, however, how far the Defendants are justified in asserting that the funds obtained by Maurice Cuvillier were resorted to for the payment of liabilities by A. Cuvillier & Co. Three witnesses depose to this. Austin Cuvillier says, "the drafts "1, 2, 3 and 4 were discounted at Plaintiff's Bank agency in New York, and the proceeds were "applied to meet engagements of our firm there." Benjaman S. Curry says, "the proceeds of those "drafts went to the credit of A. Cuvillier & Co. in C. H. Castle's account current with them, and "were drawn against purchases of groceries for them in New York. The said drafts were charged in "A. Cuvillier & Co.'s books to C. H. Castle."

Edward Chaplin says, "I declare that those drafts were made, accepted and discounted for the

" purpose of being used in A. Cuvillier & Co.'s business and were *in part* placed to their credit in C. H
" Castle's account with them. This account is produced as Defendants' Exhibit number one and is in
" accordance with A. Cuvillier & Co.'s books where they stand charged to said Castle. I observe by this
" account that the *remaining portion of the proceeds of the said drafts* was credited by Castle to
" H. Bull & Company."

The books of A. Cuvillier & Company have not been produced, nor have any extracts from them been shewn or proven to contain true entries. Parol testimony cannot supply the want of them. Again Defendants' Exhibit number one is not proved. It purports to be an account current between A. Cuvillier & Co. and C. H. Castle, with interest to 1st November, 1854. The debit side contains charges from the 1st—4th November, 1854, to the 30th.—2nd January, 1855, and the credit side two charges of $6000 each purporting to be drafts on H. B. & Co. one at three months, and the other due 13th—16th March. *It is not balanced, nor dated, nor signed.* There is nothing to shew that it was ever rendered by Castle or any one authorized by him, and no attempt whatever has been made to prove any of the items, or to shew whence it proceeded. This paper does not bind Castle in any manner but as between the Plaintiff and the Defendants, its contents require to be proved, and it is a mere piece of waste paper upon this record.

Both Austin Cuvillier and Curry are in error when they speak of the application of the proceeds obtained from the Bank at New York. That application did not lie within their knowledge, and they could only speak from surmise. Curry undertakes to say that the drafts " were drawn against purchases of groceries for them (A. Cuvillier & Co.) in New York." The informal paper called account current, if worth anything, shews by the first five items on the debit side, amounting in the aggregate to 16079 dollars out of a total of 16793 dollars added up on that side, that instead of groceries, the drafts are made to meet a balance of account, and four acceptances of other drafts. Austin Cuvillier says, " the proceeds were applied to meet engagements of our firm there," as has been remarked by Chaplin, this supposed account current of Castle contains two items of 1000 dollars, each credited to B. & Co. that is probably Bull & Co. a firm in which A. Cuvillier & Co. had no interest, although Maurice Cuvillier individually had an interest. It is to be noticed also that the credit side of this paper distinguishes the drafts on M. C., presumably Maurice Cuvillier, from one under date of the 25th October 1854 "A. C. & Co. acceptance of my draft due to day 1500 dollars." The two items of the 21st and 24th October 1854 " less credited B. & Co. 1000 dollars " imply necessarily another account current with B. & Co., but this is neither proved nor even alluded to. It was for the Defendants to have examined Castle, for he or his clerks could alone prove the purpose and object for which the credit at New York was procured and in what manner the funds raised from that source were applied or disposed of. The Defendants themselves have put their own construction upon the words " less credited B. & Co.," for Chaplin their witness says " I observe by this account that the *remaining " portion of the proceeds of the said drafts was credited by Castle to H. Bull & Company.*"

The Court below then was in error, in assigning as a ground for dismissing the claim of the Bank upon the four bills of Exchange in question, that they " were accepted by the said Maurice " Cuvillier and were discounted by the said Plaintiff for the benefit of the firm of A Cuvillier & Co of " which firm the said Maurice Cuvillier was a member, and this to the *knowledge of the said Plaintiff.* The credit was in the name of Castle, who was free to use it for any purpose he thought fit, either in connection with Maurice Cuvillier's individual business, or that of A. Cuvillier & Co., or Bull & Co. or in any other way. It was Impossible for the Bank to foresee what Castle would do with their funds, over which they lost all control, the moment they came into his possession.

The Bank could have no knowledge that these discounts were for the benefit of the firm of A. Cuvillier & Co. The Defendants have not pleaded that Castle too was a *prête nom*, and no correspondence between him and A. Cuvillier & Co. on the subject of these credits is produced. If even the individual account of Maurice Cuvillier with the firm of Austin Cuvillier & Co. had been produced, the items would require to be proved to make them evidence against the Bank. The statement of the Defendants' witnesses that the entries in the books of Austin Cuvillier & Co. corresponded with those in the account kept by Maurice Cuvillier at the Bank, is worth nothing, it is no evidence, without the production of the books and account, neither of which are before the Court. But even beyond this, this portion of the testimony is disproved by the Defendants themselves, the Bank account with Maurice Cuvillier must have stated the amount of the credits in full, plus the Bank charge for discount. The books of A. Cuvillier & Co. if even they corresponded with the paper called account current, would take no notice of the two thousand dollars credited to Bull and Co.

The purpose for which the deed was signed by the Defendants, was to obtain a credit with the Bank in favor of Maurice Cuvillier, to enable him to wind up the estate of Cuvillier & Sons, and to engage in business, on his own account, *at Montreal and elsewhere.*

An account was in consequence opened by the Bank with him, and in his own individual name The firm of A. Cuvillier & Co. had an existence before this apart from Cuvillier & Sons, no connection with Cuvillier & Co. on the part of Maurice Cuvillier is pretended to have existed prior to 1851, when Chaplin says " Maurice Cuvillier took an interest in the business *in the nature of a partner having a share* (what share?) *in the profits and partaking of the liabilities.*" The declaration of partnership required by the Provincial Statute of the 12 Victoria chapter 45 is made by Austin Cuvillier, Maurice Cuvillier and Edward Chaplin at the office of the Prothonotary on the 21st July, 1852. (Schedule No. 40)

This declaration is of course proof against the partners, yet, though not proof as to third parties, taking for granted, the date of 1851 or that of May or June, 1852; there was an interval between such date and the 26th July, 1849, when the Defendants signed the deed upon which the Bank has brought its suit. During these two years or three years as the case may be, the account between Maurice Cuvillier and the Bank, according to the pretentions of the Defendants themselves, must have been confined to his own business apart and distinct from that of A. Cuvillier & Co. If the evidence of Maurice Cuvillier is to be received he continued to wind up the Estate of Cuvillier & Sons till November, 1851, when he and his brother Austin purchased the interest of his sisters the Defendants in their father's estate. Although he asserts " I have done *no regular business on my own account individually* since my father's death," it follows from what has been said, that the Defendants were liable to the Bank, under the deed, upon their own theory, for all discounts and advances made to him during this interval of time. The account of Maurice Cuvillier with the Bank was never altered; Austin Cuvillier & Co. after the accession of Maurice to the firm, opened no new account with the Appellants. The Bank would have no transactions with A. Cuvillier & Co., who kept their account with the Montreal Bank and the City Bank. No notice was given to the Bank of the sale by the Defendants to their two brothers as stated by Maurice, whether such sale took place or not, (for of that there is not due proof) but the mere assertion of Maurice Cuvillier only. The terms of this sale are not stated, but it is in evidence by the Defendants' own witness Benjamin S. Curry (page 40 of printed record) that at the very time of his examination " *I am now employed by Mr. A. M. Belisle (one of the Defendants) to balance the Books at Belleville of the late firm of Cuvillier & Sons.*" This was as late as the 1st. April 1857. It is quite intelligible now, why the Defendants have not pleaded that the estate of Cuvillier & Sons had been wound up and liquidated, and why their exception makes no mention of any connection between Maurice Cuvillier and Bull & Company.

The Defendants object to the connection with Cuvillier and Co. as relieving them from liability under the bond, but are silent as to Bull & Co. Now Mr Davidson, when examined by the Defendants, says " I understood *that Bull & Co. were largely indebted to the firm of Cuvillier & Sons and that Mr.* " *Maurice Cuvillier was endeavouring to recover that debt, and that his transactions with Bull & Co. had reference* " *to that object.*" Down to the 1st April 1857, long after the transactions now in question, and even after the bringing of this suit, the books of Cuvillier & Sons were not balanced and that estate continued

unliquidated. The paper styled account current makes a distinction in the same transaction originating with Maurice Cuvillier between the respective interests of the two firms of Cuvillier & Co. and Bull & Co. in the same round sum of money. But by what *ear*-mark could the Bank discern that the credit in the name of Castle, was to be apportioned at all, and what proportion was to be allotted to each of the two firms, or any of them?

The Defendants have sought to establish a negative that Maurice Cuvillier carried on no business for himself individually. Their witnesses express opinions more or less strongly upon this point. But, on the part of the Bank, every credit which they gave to Maurice Cuvillier in their account with him was an individual transaction with him, forming part of a series commencing from the date of the deed, and continuing unbroken and unaltered till the close of their transactions. He bought bills of Exchange, in his own name, payable to his own order, he accepted bills drawn on himself individually, he endorsed negotiable securities in his own name, not a farthing was drawn in his account with the Bank, but upon his own cheeque, he dealt individually with Bull & Co. in one shape or another, he opens credits on New York in his own name, but all liability for this is relieved by the word *prête nom* and the mere vague opinion of witnesses, without means of ascertaining the fact. On this point, it is only necessary to ask to whom was the credit given by the Bank? The only answer must be, that it was to Maurice Cuvillier, in reliance upon the security afforded by the deed of the 26th July, 1849. With reference to the four bills of Exchange, the name of A. Cuvillier & Co. does not appear at all, it was not upon their credit then, that the Bank took them. As to the other four pieces of negotiable paper, although bearing upon them the name of A. Cuvillier & Co. they are only discounted for Maurice Cuvillier upon his individual credit and signature. Why should the Bank require this signature, if the personal liability of Maurice Cuvillier was alone looked to apart from the deed. As a partner, his liability was as perfect and as great under the signature of A. Cuvillier & Co. as with the addition of his own name. Why was this addition required by the Bank? Only to bind the Defendants, in the terms of the deed "*generally for all the present and future liabilities of the said* "*Maurice Cuvillier towards* the parties of the third and fourth parts respectively, whether as *maker or* "*drawer, endorser or acceptor of negotiable paper or otherwise*, and whether resulting from *discounts*, "*pecuniary advances or any other cause whatever.*" The Bank all along relied upon the security afforded by the deed, without which credit would have been refused to Maurice Cuvillier as it was to A. Cuvillier & Co. The officers of the Bank had an eye specially to this deed, and even took advice, as to the extent of its operation. Although the Defendants have attempted to shew that credit was given irrespective of it, even supposing the evidence of Mr. Austin Cuvillier to avail against the terms of that deed, I can attach no weight to it, after the contradiction given to that evidence by Messrs. Davidson and Paton. It may have been flattering to the vanity of Mr. Austin Cuvillier to believe that the Bank required no security from the deed. But it is not to be supposed that gentlemen intrusted with the affairs of the Bank, and knowing their responsibility, would feel themselves at liberty, to treat as waste paper, a document of the stringent character of that in question, and so formalin its import. Upon the most careful consideration of the evidence. I arrive at the conclusion that the four bills of Exchange declared upon, are altogether unconnected with A. Cuvillier & Co. in their concoction, that they are to be viewed as representing advances made to Maurice Cuvillier, individually, that they were taken by the Bank upon the faith of the Defendants' guarantee contained in the deed and upon the reliance that Maurice Cuvillier would apply the proceeds pursuant to the trust reposed in him, that if any part of these proceeds was applied to the purposes of the firm of A. Cuvillier & Co. it was undistinguishable from the rest by the Bank, and by all the world, except those behind the scenes, that Bull & Co. actually obtained a part of the funds raised, which may or may not have profited the estate of Cuvillier & Sons, as the case may be; and that for aught that appears to the contrary, Maurice Cuvillier individually may have profited by this transaction as well as C. H. Castle, whose participation in it is wholly unexplained, and who alone could throw light upon it, as a witness if examined by the Defendants.

I am of opinion that the Defendants have wholly failed to prove their exception with regard to this portion of the demand of the Bank, and that the statement contained in the judgment of the Court below, that the four bills in question were "accepted by the said Maurice Cuvillier, and were *discounted by the said* "*Plaintiff* for the benefit of the firm of A. Cuvillier & Co. and this *to the knowledge* "*of the said Plaintiff*," is not sustained by the evidence of record, but is directly contradicted by it.

To proceed now to the consideration of the three drafts, drawn by A. Cuvillier & Co. on Henry Bull and Company at Belleville which were discounted by the Bank upon the individual endorsement of Maurice Cuvillier in his own name.

It is to be observed, that the judgment of the Court below upon this head of the demand of the Bank, asserts that these drafts "were in point of fact discounted for the benefit of the said "firm of A. Cuvillier & Co. as the said Maurice Cuvillier the payee and endorser of the said "bills was, at the time of the drawing and endorsing the said bills a member of the said firms "of A. Cuvillier & Co. and of Henry Bull & Co. of Belleville, and *this to the knowledge of the* "*said Plaintiff*." The exception of the Defendants does not set up, any partnership with Bull & Co. on the part of Maurice Cuvillier, and does not seek to impugn this transaction, upon the ground of such partnership, as in the case of Cuvillier & Co. The evidence as to the connection of Maurice Cuvillier with Bull & Co. is very loose and unsatisfactory, and hardly would warrant the statement, that a co-partnership was proved.

But, however, this may be, there is nothing to shew that Maurice Cuvillier, being connected with both firms, obtained a discount from the Bank, for the benefit of one of them rather than the other. Nothing to shew the state of accounts between the two firms, or to exclude a personal and individual interest on the part of Maurice Cuvillier, in getting this paper discounted. A connection between Cuvillier & Sons, and Bull & Co. is proved, of the precise nature of the connection there is no proof, nor on the part of the Bank was this necessary. If Bull & Co. were indebted to the estate of Cuvillier & Sons, or if there were accounts between them, (as beyond doubt there were,) the Bank in discounting paper upon which the name of Bull & Co. appeared after Maurice Cuvillier's endorsement was affixed, had every reason to suppose the transaction real and not fictitious. In discounting this paper, the Bank credited neither Cuvillier & Co. nor Bull & Co. but the proceeds were put to the the credit of Maurice Cuvillier, with whom alone there stood any account open in their books. Against the credit upon this discount, Maurice Cuvillier might checque for himself, and on his own private account, or upon any account whatever. There is nothing to warrant the conclusion stated in the judgment, that in point of fact, the drafts were discounted for the benefit of the said firm of A. Cuvillier & Co. However Maurice Cuvillier may have used the proceeds, the Bank could only have made the discount for its own particular customer Maurice Cuvillier, and not for the two firms who were not customers and had no account there.

As has been already said, the Defendants have not set up, either that their liability under the deed never attached at all, or that it came to an end at any particular time, or was not a continuing guarantee or that it had been defeated. If the Defendants had pleaded that Maurice Cuvillier by becoming a partner in the firm of A. Cuvillier & Co. on a particular day, had put an end to the guarantee, or that the affairs of A. Cuvillier & Sons had been entirely liquidated and wound up on a given day, and that therefore the guarantee had determined, the defence would have been intelligible, and would have furnished an answer to the demand of the Bank. But the attempt to distinguish the transactions of Maurice Cuvillier, into those lying within, and those "*hors de son commerce individuel*" "n' ayant pas pour cause on objet un *commerce individuel de sa part, et n'etant à son egard individuel que* "*des obligations ou dettes d'un caractere civil, non d'un caractere commercial*," seems in my apprehension "very wire drawn and thin spun." It seems singular to compel a Bank to draw the line

of distinction between "*dettes d'un caractere civil*," and "*dettes d'un caractere commercial*." If distinction there be, why did not the Defendants, who as heirs of the late Austin Cuvillier, and sisters of Maurice Cuvillier, could best discern it, point out this distinction, and notify the Bank, that an association between Maurice Cuvillier and his brother Austin Cuvillier the younger, drew a line of demarcation, as to future transactions? The theory set up by the Defendants is, that Maurice Cuvillier never had any "*commerce individuel*" at all or any "*dettes d'un caractere commercial*." Then, why was any account commenced at all with the Bank in the name of Maurice Cuvillier? It is not denied that the liquidation of the estate of Cuvillier & Sons was in the hands of Maurice Cuvillier, acting on behalf of the family Cuvillier.

In the interval between the date of the deed and the connection with Cuvillier & Co., mercantile paper of every kind must have passed between Maurice Cuvillier and the Bank, in which the firm of Cuvillier & Sons, in liquidation had an interest. Is it to be argued that the Bank was to look at each individual piece of paper, and trace its pedigree up to Cuvillier & Sons before dealing with it? Such a pretension would be ridiculous, and it can only excite a smile to notice such a statement as that of the witness Curry, that the checks deposited by Maurice Cuvillier, in the Plaintiff's Bank the "greater proportion had previously been received by A. Cuvillier & Co. in the ordinary course of "their business that is to say the name of the firm was mentioned in the greater portion of these checks "as the payees of them." As, if in taking a cheque to bearer over the bank counter, anything else was looked at than the name of the drawer and the amount, and that there were funds to meet it. The Defendants have attempted to prove a negative, that notwithstanding the terms of the deed Maurice Cuvillier, never engaged in business on his own account either in Montreal or elsewhere. The cross examination of the witnesses, shews their inability to do more, than to express mere surmise, or opinion upon this point. Every endorsement by Maurice Cuvillier of negotiable paper discounted at the Bank, was in Law a new drawing and an individual transaction of a commercial nature between him and the Bank, in the terms of the deed binding upon the Defendants. The credit having been once opened to Maurice Cuvillier pursuant to the deed, it was for the Defendants to close that account and their liability, at the same time by proper countermand and due notice. Admitting Maurice Cuvillier to have been a partner both of Cuvillier & Co. and of Bull & Co., there was nothing to prevent him from negotiating their paper for his own account, and of disposing of it, upon his own individual endorsement. It was that individual endorsement which was guaranteed by the deed. If it were improperly given, and loss is to occur, it should properly fall upon the Defendants by whose act the credit was procured, and not upon the Bank,—upon the co-heirs of Maurice Cuvillier joint and several obligors with him under the bond rather than strangers. These observations apply equally to the promissory note of Grenier, the last head of the demand of the Bank, as to the Bills and drafts. By the endorsement of A. Cuvillier & Co. it became the property ostensibly of Maurice Cuvillier between whom and the Bank its discount became a new and individual transaction, irrespectively either of Grenier the maker or Cuvillier & Co. the payees and endorsers. Why should the Bank have questioned the title of Maurice Cuvillier to this note, or have refused to discount it at his request, and to place the amount to his individual credit, in the account standing open in his name, and undisturbed from the time of the signing of the Deed? That title could no more be questioned, than the title of Maurice Cuvillier, to the bill of Exchange, sold to him by the Bank and made payable to himself or order for a thousand pounds sterling, which was purchased by him, out of discounts upon the paper of A. Cuvillier & Co. Maurice Cuvillier might endorse this bill to A. Cuvillier & Co. on their account or to any one else, as they might endorse Grenier's note, to him, to be discounted on his private account and in his individual name. The judgment of the Court below states that the Bank has not made out its case and that the Defendants have proved their exception. I am of opinion on the contrary that the Bank made out a primâ facie case against the Defendants, which entitled it to judgment, and that the exception ought to have been overruled and dismissed, for want of proof, if for no other reason, as to legal sufficiency.

The point however which has been chiefly debated between the parties, turns upon the construction of the deed. The Defendants have viewed that instrument, as as an ordinary suretyship or *cautionnement*, they have contended "natura fidejussionis est strictissimi juris et nondur at vel exten- "ditur, de re ad rem, de personâ ad personam, de tempore ad tempus." The Court below has adopted this view, and even the bank has consented, to treat the contract as one simply of suretyship. I have never been able to see it in this light. The personal interest in the business of the Estate of Cuvillier and Sons, on the part of the Defendants, is manifest. That Estate was wound up and managed by Maurice Cuvillier acting for his mother, his sisters the Defendants, and himself, and his brother Austin Cuvillier the younger.

The business of the Estate was evidently a very large one, not confined to Montreal alone but extending to Belleville in Upper Canada. It has come out in evidence, by the very witnesses of the Defendants, that at a given time, they sold or transferred their interest in their father's Estate to their brothers Maurice Cuvillier and Austin Cuvillier the younger. The price or the conditions of this transaction are not stated, but it may reasonably be supposed, that a large sum of money was involved in it. In the absence of a direct interest in the estate it would be difficult to understand, how a widow and her three daughters would undertake a joint and several liability with Maurice Cuvillier, such as that shewn by the deed, which contains no limit either as to time or amount. But when the true position of the Defendants towards their father's Estate, and relatively to their brothers, is properly considered, it becomes plain that their interests were all bound up together. It was with a view to that interest and for their own profit and advantage, that they made "themselves jointly and severally "liable to and in favor of the said parties hereto of the third and fourth parts respectively, they thereof "accepting, for ALL DEBTS *heretofore contracted, or that may hereafter be contracted, to and in favor of the "parties of the third and fourth parts respctiely by the said Maurice Cuvillier*, and GENERALLY for ALL "the present and FUTURE LIABILITIES of the said Maurice Cuvillier, whether as maker or drawer, "ENDORSER or ACCEPTOR of NEGOTIABLE PAPER or OTHERWISE, and whether resulting from DISCOUNTS, "pecuniary advances, OR ANY OTHER CAUSE WHATEVER, hereby JOINTLY and SEVERALLY promising and "obliging themselves, to MEET AND PAY, the said present and FUTURE DEBTS AND LIABILITIES of the "said Maurice Cuvillier, as if THEY WERE JOINTLY AND SEVERALLY THE PRINCIPAL DEBTORS THEREOF."

Is the construction of this obligation to be restrained and limited, by the rules applicable to the ordinary every day *cautionnement*? I cannot bring myself to believe this. The relation between the parties is that of *principal and agent*, not that of *principal and surety*; and in this case the agent was not the ordinary *procurator*, but the *procurator universorum bonorum*, and *procurator in rem suam*, at the same time.

But, assuming hypothetically, that the contract under consideration is to be viewed as a *cautionnement*; the terms of it are so extensive, so general, or rather universal and comprehensive, that it is plainly an exception to the usual and ordinary *cautionnement* or suretyship. "Lorsque les "termes du cautionnement sont généraux et indéfinis, le fidejusseur est censé s'être obligé *à toutes les "obligations* du principal débiteur, résultans du contrat auquel il a accedé, il est censé *l'avoir cautionné "in omnem causam*, Pothier Obligations No. 404."

"Si les lettres de crédit ne sont point restreintes à une somme déterminée, elles donnent une "action au banquier pour *toutes celles que le mandant lui aura adressés* c'est le cas d'appliquer la loi *si ita* "55 Digestor, de fidejussoribus suivant laquelle, *si verba sunt ad infinitatem* tolerantur infinitas. Digest, 46. 1. 55, si ita stipulatus. Denisart, verbis, Lettres de crédit." This law 55 is from Paulus lib 2, quœstionum, and as follows. "Si ita stipulatus a Seio fuero, QUANTAM PECUNIAM *Titio* QUANDOQUE "CREDIDERO, dare spondes? et fidejussores accepero, DEINDE *Titio* SAEPIUS CREDIDERO: nempe seio "in OMNES SUMMAS obligatus est et per hoc FIDEJUSSORES QUOQUE."

The glossa f. upon this law is *verba* EXTENSIVA et INFINITA, infinitatem inducunt: at que ita

INFINITAS TOLERATUR. Digesta seu Pandectarum Juris Civilis, tomus tertius, page 1110. Lugduni Sumptibus Philiberte 1618. "The general rule is fidejussores non obligari ad id quod mora " debitoris ad principale obligationem accedere potest. But if the surety had bound himself *in* " *omnem causam* he is liable for whatever interest becomes payable by reason of the debtor's delay. " He will be liable to the full extent which the *terms of the obligation or the nature of the act for which he* " *has obliged himself will warrant.* Thus if *the terms are general and indefinite*, he is bound *for all* the " *obligations* of the principal debtor *necessarily incident to* or resulting from *the contract or act for which he* " *has become surety.* In this case he is said to be a *surety in omnem causam.*" Burge, Suretyship 53. 4. " Quicunque actionis aut negotii, alicujus nomine, intercedit, *in omnem causam intercedere intelligitur*, NISI TAXATIONEM CERTAM, fidejussioni appesuerit." Hering. fidejuss. cap. 24, No. 139, 3, 4.

" Autant l'article 2015 ordonne de ne pas de passer les limites du cautionnement quand *ces limites* " *sont définies, autant il lui donne de latitude, quand il a été contracté indéfiniment.* Un *cautionnement est* " *indefini* lorsqu'il a été contracté IN UNIVERSAM CAUSAM pour me servir des expressions de Paul (l. 56 " de) edilitio edicto, Il dit IN OMNEM CAUSAM dans la loi 56 Dig. de Fidejussoribus. Et il a ce carac- " tère *lorsque rien dans le contrat ne le restreint d'une manière expresse ou tacite.* En pareil cas *le créancier* " *est censé avoir stipulé qu'il sera pleinement indemnisé par le fidejusseur.* INDEMNEM ME PRÆSTABIS." Troplong du cautionnement No. 167.

Connexorum et *dependentium* idemest judicium, "Il est évident que le fidejusseur d'une obligation " s'oblige non seulement à la chose, à laquelle le débiteur principal s'est expressément et directement " engagé mais encore à toutes les causes non exprimées qui peuvent provenir de la nature du contrat." Simplex fidejussor alicujus contractus (dit Casaregis) non solum obligatur ad id ad quod " principalis " debitor expressè aut directè tenetur, sed obligatur etiam pro *omnibus illis casibus et causis non expressis,* " *quæ possunt provenire ex naturâ ipsius contractûs.* Discursus 62, No. 40, Vol. 1 p. 225. Venetiis, 1740 ex typographiâ Balleonianâ. Troplong, ut supra No. 168.

Casaregis cités first among his authorities the Law Latinus 56 Dig. Edilitio Edicto, and adds what Troplong has omitted " nec non tenetur *pro omnibus* aliis accessoriis, CONNEXIS, et *dependentibus* " ab eodem contractu. Et in *terminis magis dubitabilibus*, quod scilicet fidejussor obligetur in casu etiam " resolutionis contractus *ob culpam* unius ex contrahentibus." Nos. 41, 42, 43, of the same Discursus 62, and he adds No. 44 " Et ita semper judicatum fuit Genuæ per nostra tribunalia ob prædictas " rationes *contra fidejussoram favore Cambistæ.*"

" Fidejussor, (says Pothier ad Pandect, lib 46, tit. 1 sect. 4 No. 34) *facil entelligitur* se *obligasse* " EODEM MODO quo se obligavit reus principalis. Qui GENERALITER fidejubet pro eo qui ex aliquo " contractu obligatus est, intelligitur fidejubere in OMNEM OBLIGATIONEM quæ ex illo contractu " descendit." No. 35.

" Toutes choses égales de part et d'autre, la clause douteuse doit s'interpréter contre celui qui " par la nature du contrat était maitre d'endicter les conditions, *fût-ce même le débiteur*, lorsque s'étant " engagé SANS RESTRICTICTION IL VEUT ENSUITE EN SUPPOSER, parcequ'il était maitre de ne pas s'obli- " ger sans prendre ses précautions, 1 Pardessus Droit Commercial, partie 2, tit. 1, cap. 2, sect 3, " No. 191, p. 328."

" On doit tenir d'abord comme maxime invariable qu'il n'est permis d'interpréter que ce qui en " a besoin, Pardessus ut supra, p. 325."

" La caution qui n'a pas limité son engagement à une somme déterminée doit acquitter en entier ce " qui sera dû à l'échéance ou à l'évènement, tant en principal qu'accessoires et dommages intérêts. Suivant " *la nature* de *l'obligation cautionnée* ou la POSITION RESPECTIVE DES PARTIES, c'est à déterminer l'*étendue* " *du cautionnement.* Pardessus Droit Commercial, part. 3, tit. 7, chap. 2, No. 586, Vol. 2, p. 436." Troplong Cautionnement No. 160 lays down. " Elles (les lois Romaines) prévoient le cas où un " contrat est résolu par la faute du contractant qui a été cautionné et elles *étendent* à la caution toutes " les conséquences de cet évènement. 161, Nous les voyons même déclarer la caution responsable des " *agissemens* qui *se rattachent par voie de conséquence et de connexité à une convention légalement disposée.* 162 " C'est sur l'autorité de ces lois que Casaregis d'accord du reste avec le Guidon de la Mer et Emerigon " décide que lorsqu'un emprunteur à la grosse, (lequel ne doit rendre la somme prêtée qu'en cas " d'heureux retour) *pratique un sinistre frauduleux, son fidejusseur est tenu de la restitution de cette somme aux* " *prêteurs, attendu qu'il est tenu de la faute et du dol de celui qu'il a cautionné.*"

At No. 146, of the same treatise, Troplong says, " nous répétons donc que LES CIRCONSTANCES " ONT ICI UNE INFLUENCE SOUVERAINE. Les exemples ne doivent être pris QU'AVEC PRECAUTION, et il " est dangereux de conclure d'un cas à l'autre, sans avoir égard à LA QUALITÉ DES PERSONNES, AUX " RAPPORTS RESPECTIFS, AU STYLE DU COMMERCE, aux habitudes des places, etc. Sans doute le cau- " tionnement ne se présume pas, *il ne faut pas être facile à l'admettre* mais il ne faut non plus EXIGER LA " PRONONCIATION DES MOTS SACRAMENTELS ET REFUSER DE LE VOIR DANS LES CLAUSES OU L'USAGE ET LA " BONNE FOI L'APERCOIVENT HABITUELLEMENT."

At No. 147, the same great lawyer says: " Quoique le cautionnement ne se présume pas " CEPENDANT LA LOI L'ADMET DE PLEIN DROIT DANS CERTAINES CIRCONSTANCES." I cannot hope to find stronger "*circonstances*," in any case, to hold the Defendants liable for the intromissions of Maurice Cuvillier, in the business of the family or for contracts entered into, upon the credit of his name individually, AS STIPULATED FOR BY THE DEFENDANTS IN REM UNIVERSAM, with this Bank. The pretensions of the Defendants seem to me, against good faith,—and in judging of this cause, I repose the fullest and most entire confidence, in the evidence given by Mr. David Davidson, on the part of the Bank. His relations with the Bank had ceased at the time of his examination as a witness, and if any loss is to follow to that institution, by his conduct in this matter, I see no reason to charge him with it. In my opinion, the Bank, were entitled to rely upon the deed, and my belief is that they did, and that they never trusted Cuvillier & Co. with whom they would not even deal, or Bull & Co. of whom they had not satisfactory knowledge, but that they advanced their money upon the credit due to the estate and succession of the Honorable Austin Cuvillier, as pledged by the deed upon the name "*Maurice Cuvillier*" individually and alone, not to be doubted or mistrusted, but to be viewed in the self same light, as the name of Cuvillier & Sons in the handwriting of the late Honorable Austin Cuvillier himself. *Hæreditas personam defuncti sustinet.* Why did the Defendants intervene in the deed, unless as the personal representatives of the deceased, and why did they undertake a joint and several obligation, *solidaire*, unless to add to the individual obligation of each of them as heir *pro parte virili* and to become answerable *in omnem causam* for their co-heir Maurice Cuvillier, whom they trusted, in universam causam, to whom they gave a letter of credit, without limit or restriction whatever, as to time, CAUSE or amount. The caution used by the Bank in refusing to deal with Cuvillier & Co., was expressly declared to Maurice Cuvillier the agent of the Defendants, and to Austin Cuvillier their brother. Was this made known by Maurice to the Defendants by their procurator *in omnem causam*? If so they are expressly bound. If not, they are answerable for the suppression of the fact. They must suffer for the fraudulent concealment by their agent Maurice Cuvillier of a matter which it so much imported them to know. But, notwithstanding the doubts of the Bank as to Cuvillier & Co., the Defendants seem to have had none themselves; *they sold their interest to Austin Cuvillier as well as to Maurice;* they trusted Austin Cuvillier the younger themselves, when the Bank would not trust him. With what face can the Defendants object to transactions connected with Cuvillier & Co., or Bull & Co., when they themselves deal with Austin Cuvillier, their own co-heir, and sell out to him and when Mr. A. M. Delisle sends up to Belleville, on the behalf of the family Cuvillier, a person to balance the books of Bull & Co., even after the bringing of this suit? Bull & Co. were "connexed" with the Estate of Cuvillier & Sons, by the showing of the Defendants themselves, why then, have they not proved, that in the Bill transaction at New York, with Castle, the doings of Maurice Cuvillier were *civil* and *non commercial?* Not but that if they had given such proof I would discharge them from liability under the deed, for, the misappropriation of the funds, if such there were

given to Maurice Cuvillier upon the faith of this instrument, in no way exempts the Defendants from the liabilities of their own trusted agent, who got the money, to use or to abuse it, only because the Defendants had stipulated that the Bank should be "*indemnis.*"

I have said that in my view of this case, it is not one of principal and surety, but of principal and agent. As I regard it, it falls within the observation of Troplong, du mandat No. 55 "Dans " certains cas le mandat peut n'être pas étranger *aux affaires du mandataire lui-même.* Mais ce n'est " qu'autant que *son intérêt se trouve mêlé à celui d'une autre personne que le mandat* regarde plus particu- " lièrement. *Quia scilicet,* dit Cujas, et MEO NEGOTIO TUUM ALIQUANTUM ADMIXTUM FUERIT. Ainsi le " mandat, peut concerner, simultanément le mandant et le mandataire comme par exemple quand Pierre " demande à François de prêter à Jacques, une somme d'argent que ce dernier doit employer AU PROFIT " DU PREMIER. *Ce mandat intervient* DANS L'INTÉRÊT PRINCIPAL DU MANDANT de Pierre, mais il n'est pas " étranger non plus à l'intérêt DU MANDATAIRE QUI PRÊTE SON ARGENT ET EN RETIRE DES PROFITS."

I regard this case as one of "*Commission,*" and I apply to it, what is said by Troplong, in his Traité du mandat 605, 606 and page 295 *interprétation de procuration.* Procuration *générale cum libertâ,* page 268.

I view it as a Commission facultative, in the words of Delamare and Le Poitevin, vol. 2, No. 204, " Le choix DES MOYENS D'EXÉCUTION OU DE QUELQUES UNS DE CES MOYENS EST ABANDONNÉ AU LIBRE " ARBITRE DE CELUI QUI L'EXÉCUTE aucun mode ne LUI EST EXPRESSÉMENT IMPOSÉ, IPSE SIBI EST LEX. " Par conséquent, QUELQUE SOIT CELUI QU'IL SE TRACE À LUI-MÊME, ON NE SAURAIT DIRE QU'IL EXCÈDE " LE MANDAT. De là cette maxime de Casaregis " In mandato collato AD LIBERUM ARBITRIUM MANDA- TARII, NUMQUAM INTRAT QUÆSTIO EXCESSUS MANDATI." I see in this case, a mandate by the Defendants, *ad liberum arbitrium,* of Maurice Cuvillier, as to which, in its exercise, the Defendants have no right to complain, against the Bank, who gave a credit and trust, as they were told to do, *in omnem casum.* Excess of authority under the circumstances is not to be thought of, nor can the distinction between *des obligations d'un caractère civil* and those D'UN CARACTÈRE COMMERCIAL, be recognised for a moment. It is a distinction without a difference, Troplong in the traité du mandat says No. 285, page 295. " Dans le commerce on peut même concevoir plus de latitude dans l'interprétation de la procuration. " les circonstances en décident. Par exemple, je vous charge de faire le commerce pour moi et à " ma place dans la ville de Nancy, et il est reconnu que pour faire marcher ce commerce, vous êtes " dans la nécessité de souscrire des billets à ordre, ou d'emprunter, dans la mesure où j'aurais dû " le faire moi-même si j'avais été présent. Nul doute que vous n'ayez agi dans les termes de votre " mandat général. C'est la doctrine de Deluca, Hinc non improbabiliter de jure dicendum videbatur, " subdicto mandato, seu INSTITORIÀ GENERALI istam quoque facultatem contineri, quoniam procuratore, " constituto ad aliquid agendum, *demandata* censentur OMNIA EA QUÆ PRO EO NEGOTIO EXPLENDO " NECESSARIA SUNT ; illa præsertim quæ de communi usu fieri solent *et quæ veri similiter, idem principalis, " pro eodem negotio explendo faceret.* De cambiis discurs. 13 No. 6 à 7. Ces dernières paroles sont dignes " de remarques."

Now what is the contract which the Defendants by their theory seek to repudiate? A transaction with their own brother, Austin Cuvillier the younger, their coheir, whom they trusted themselves so far as to sell to him and Maurice Cuvillier their interest in the father's estate, and another with Bull & Co., a business connection of their father, whose Books, at Belleville, were long after this, balanced by a person expressly employed for the purpose by Mr. A. M. Delisle, acting for the Defendants. What more natural then, than dealing with such parties? At No. 274, Troplong again says: " Le sens de l'article 1987 est " que la procuration est générale alors même qu'elle renferme le mandataire dans une certaine fonction " pourvu que dans cette fonction elle lui laisse *le pouvoir de faire toutes les affaires prévues ou imprévues " qui s'y rattachent successivement.* Ainsi *faites le commerce à ma place dans la ville de Smyrne,* voilà une " procuration générale, bien que le mandant n'autorise le mandataire que pour le commerce et nulle- " ment pour ses autres affaires étrangères au commerce. Mais comme dans le commerce que le man- " dant veut fait à Smyrne, il communique au mandataire le pouvoir d'agir de la manière la plus " entendue la plus libre, relativement à toutes les affaires quelconques que le commerce nécessite, ce " mandataire à un mandat général." Deluca De Cambiis discurs. 13 No. 6 uses the phrase "institor generalis" and I know of none which more definitely and appropriately characterizes the relation between the Defendants and Maurice Cuvillier, under this deed. To cite again from Troplong mandat No. 604. " Quoique nous ayons dit tout à l'heure que le mandant n'est tenu envers les tiers qu'autant " que le mandataire a agi conformément à ses pouvoirs, il faut cependant tempérer cette règle par une " exception et cette exception a lieu quand L'ABUS DU MANDAT loin de ressortir de la procuration est " au contraire, couvert par la procuration même dont la production a induit les tiers en erreur. Je " m'explique. Je donne procuration à Pierre d'emprunter 300 francs, Pierre fait à Primus cet em- " prunt. Mais au lieu de s'arrêter là, il se sert du mandat pour contracter en mon nom un deuxième, " un troisième emprunt de Secundus et de Tertius. Bien que Pierre ait fait de ma procuration un " usage excessif, bien que les deux derniers emprunts soient contraires à mes instructions et par consé- " quent illégitimes, je n'en suis pas moins obligé personnellement envers Secundus et Tertius, s'ils ont " été de bonne foi. Pierre avait un pouvoir apparent les tiers ont eu juste sujet d'y croire. Il n'y " a aucune sûreté à traiter avec un absent, si on les rendait responsables d'un abus caché."

605. " Et la raison est ici d'accord avec le crédit privé, qui milite pour les tiers. C'est en effet " la faute du mandant de n'avoir pas précisé la personne auprès de laquelle il voulait que l'emprunt " fut fait. Ou bien, si à cet égard il n'est pas reprochable, c'est sa faute d'avoir laissé la procuration " aux mains de son mandataire après que le mandat était accompli par le premier emprunt. Ou bien " enfin si sous ce second rapport, il a de bonnes excuses, il est dans tous les cas *responsable d'avoir mal " placé sa confiance,* c'est lui *qui doit en souffrir et non pas les* TIERS QU'IL A MIS EN RAPPORT AVEC CE " MANDATAIRE INFIDEL. Publicæ repugnat aequitati dit excellemment Ansaldus. Discursus 30, No. 4, " Civili que commercio quod quis sincerâ fide contrahens, cum aliquo præmanibus habente publicum " instrumentum mandati debeat sub istâ bonâ fide decipi.

606. " Ces exemples ne sont pas les seuls. La procuration peut avoir été révoquée, le mandataire " *a forfait à ses devoirs en continuant une gestion qui lui* est interdite. *Mais quand cette révocation est " ignorée des tiers, de quel droit le mandant la leur opposerait-il? Pourrait-il* leur faire un reproche d'avoir " eu confiance dans cette procuration, dont son mandataire était porteur? Pourquoi ne l'a-t-il pas " retirée des mains de ce dernier? Pourquoi a-t-il laissé ce titre de nature à attirer la con- " fiance des tiers, quels moyens les tiers auraient-ils donc de se premunir contre ces abus impénétrables " à leur recherche, où serait la sûreté dans les affaires?

" Si dominus sciverit procuratorem suum fines mandati excedere, et non contradixerit, assentire " *videtur.*" Straccha, mandati 18. If it be true that no business was done by Maurice Cuvillier on individual account, before he entered into the firm of A. Cuvillier & Co., why did not the Defendants countermand the credit opened for him at the Bank under their Deed. No public notice seems to have been given of his having formed this connection, the entry made in the office of the Prothonotary, gives no notice to the world, it is lodged in silence, and remains in the pigeon holes of the officer, until searched for. The Bank account continued in Maurice Cuvillier's name, after the formation of this connection just as it stood before.

" The Scottish Banks (says Burge, page 60) have been accustomed to open with their customers a peculiar sort of cash account or bank credit, which has produced great benefit to all branches of trade and manufactures. A cash credit of this description is an undertaking on the part of a Bank to advance to an individual, or to a partnership such sums of money as may be from time to time required not exceeding on the whole a certain definite amount to be repaid, and a continual circulation kept up by the replacing in the bank of small profits and sums as they come in." The present transaction is of that class, only unlimited as to amount or to time.

Bell again p. 65, says "In Scotland, where there is a change on the part of the creditor, where a cash credit bond is granted to a banking house, the partners of which happen to be materially altered, during the currency of the credit, do the cautioners Mr. Bell asks continue to be responsible notwithstanding change and without any notice or any renewal of their engagement? He answers it would be a great hardship, even on the customers, if on every change all the bonds of credit of a banking house were to be renewed, but there does not seem in Law to be any necessity for this, and generally there is a stipulation against in the bond, 1 Bell Commentaries on the Law of Scotland 371.

"A guarantee of furnishings to be made to a Company will not authorise furnishing after a "radical change in partnership, though if such furnishings are made *bonâ fide and in ignorance of any* "*change the guarantee will be effectual.*" Bell, ut supra. "*Innovationes ac mutationes vel nova pacta facta a* "*mercatoribus contra formam* LITERARUM OBLATORIARUM et NON DEDUCTA AD NOTICIAM CORRESPONSA- "LIUM NON INFRINGUNT PRIMÆVAM OBLIGATIONEM IN DICTIS LITERIS CONTRACTAM." Casaregis Discursus 34, No. 26, vol. 1, p. 121. Potissime attenta importantia istarum literarum quæ OBLATORIÆ nuncupantur, quæ ve adeo religiose custodiuntur et custodiri debent inter mercatores, ut eæ semper fixæ et inviolabiliter servandæ sunt, DONEC PER ACTUM RETRO SIMILEM ET INNOVATIVUM NOTIFICETUR CONTRARIUM CORRESPONSALIBUS. Ita ut non solum quæcumque immutationes non substantiales sed NEC ETIAM PACTA ESSENTIALIA ET DESTRUCTIVA, NON DEDUCTA TAMEN AD NOTITIAM CORRESPONSALIUM MINIME ATTENDANTUR IN FRACTIONEM OBLIGATIONIS CONTENTÆ IN EISDEM LITERIS OBLIGATORIIS. *Set* bene per penuis per Rota decisionem 151, coram Reverendissimo Domino meo Decano. Casaregis Discursus 35, No. 26, page 125, vol. 1. In the same Discursus, Casaregis marks the distinction as to liability between the case of "prepositionem et institoriam particularem et institoriam generalem. Mandatum "seu præpositio ad negotiandum totaliter expirat post mortem præponentis *ob mutationem status obtin-* "*gentem in præposito seu instito* SECUS SI PRÆPOSITIO SEU MANDATUM IN LITERIS OBLATORIIS ESSET A "PRÆPONENTE UNIVERSALITER DATUM." The credit given by the Defendants to Maurice Cuvillier their *institor* was unlimited and universal. It was to his individual name alone that the Bank had to look, his name when put by him on negociable paper was the name of the Defendants themselves. Institoria actio semper presupponit, institorem, institorio sive præponentis nomine contraxisse. Müllers' Promptuarium, sub voce Institor, vol. 3, p. 641, No. 5.

Knowledge is not brought home to the Bank as contended for by the Respondents and asserted in the Judgment of the Court below. Of the good faith of the Bank I have no doubt whatever.

In conclusion I am therefore of opinion to reverse the Judgment of that Court and to enter up judgment against the Respondents jointly and severally *solidairement* with Maurice Cuvillier.

T. C. AYLWIN, J.

Montreal, 12th April, 1860.

Court of Appeals.

MONTREAL.

THE BANK OF BRITISH NORTH AMERICA,
APPELLANT.

AND

CUVILLIER ET AL.,
RESPONDENTS.

The present Appeal is from a Judgment of the Superior Court, at Montreal, of the 30th April 1858. The Action was instituted in March 1855, by the Appellant, against the Respondents who are alleged to be jointly and severally bound towards Appellant, amongst other liabilities, to the payment of the sum of £4107, 12s. Currency with interest, &c.

The Appellant's claim is made to rest on a Notarial Deed of the 26th July 1849, between Appellant and Respondents, as herein afterwards stated.

The cause or motive of the Deed is apparent from the following:

"Which said parties declared to us the said Notaries, that the said late Austin Cuvillier, of the City of Montreal, Merchant, now absent in England, and the said Maurice Cuvillier, carried on trade and commerce at this City, upon an extensive scale, under the firm of Cuvillier & Sons, until the 11th day of the present month of July, when the said firm was dissolved by the death of the said late Austin Cuvillier; that the said Maurice Cuvillier hath, since the death of the said late Austin Cuvillier, carried on, and proposes to carry on, trade and commerce in this City and elsewhere; that to enable him to do so, and to meet the engagements of the said late firm of Cuvillier & Sons, he will require discounts and pecuniary assistance to a considerable extent, from the said parties of the third and fourth parts respectively, and that with a view of making the said parties of the third and fourth parts perfectly secure with respect to any debts which now or hereafter, may be due to them respectively by the said Maurice Cuvillier, and with respect to the present and future liabilities of the said Maurice Cuvillier to the said parties of the third and fourth parts respectively, the said parties of the second part are willing to become security to and in favor of the said parties of the third and fourth parts respectively as hereinbefore setforth:—

"Now therefore, the said parties hereto of the second part do hereby make themselves jointly and severally liable to and in favor of the said parties hereto of the third and fourth parts respectively, they thereof accepting, for all debts heretofore contracted, or that may hereafter be contracted to and in favor of the parties of the third and fourth parts respectively, by the said Maurice Cuvillier, and generally for all the present and future liabilities of the said Maurice Cuvillier towards the parties of the third and fourth parts respectively, whether as maker or drawer, endorser or acceptor, of negotiable paper, or otherwise, and whether resulting from discounts, pecuniary advances, or any other cause whatever, the said parties hereto of the second part, hereby jointly and severally promising and obliging themselves to meet and pay the said present and future debts and liabilities of the said Maurice Cuvillier, as if they were jointly and severally the principal debtors thereof, and especially renouncing the benefit of the exceptions of division and discussion, and all other such exceptions, with respect to the said debts and liabilities and the obligations so hereby contracted by them. For thus &c.

Done, &c."

The parties to the Deed are:

Of the First Part,—MAURICE CUVILLIER.
" Secd. Part,—THE LATE MRS. CUVILLIER and the Respondents.
" Thd. Part,—THE BANK OF MONTREAL.
" Frth. Part,—THE APPELLANTS.

Maurice Cuvillier appeared in the cause, with the other Defendants, but made no defence; and in September 1857, while the Respondent's *Enquête* was proceeding, he confessed Judgment.

There were three Pleas fyled by the other Defendants.

By the first, they pretended that the Deed was an absolute nullity, and that the Action should be dismissed.

By the second, they contended that if bound at all by the Deed, they were, at any rate, only bound in respect of transactions, either having reference to the liquidation and settlement of the affairs of the late firm of Cuvillier & Sons, consisting of the late Hon. Austin Cuvillier, and Austin Cuvillier Jr., and Maurice Cuvillier, or wherein Maurice Cuvillier had acted on his own account and for his own profit solely; and were not bound in respect of any transactions having reference to any trade carried on by Maurice Cuvillier in partnership with others; that soon after the date of the Deed, Maurice Cuvillier, to the knowledge of the public, and of the Appellant in particular, ceased to trade on his own account; that from the spring of 1851 to about May 1852, he to the like knowledge, traded at Montreal in partnership with Austin Cuvillier Jr., his brother, under the firm of A. Cuvillier & Co.; that from the beginning of May 1852, till then, he (to the like knowledge) traded at Montreal, with the same Austin Cuvillier and one Edward Chaplin, under the same firm; that since the date of the Deed, he (to the like knowledge), had not traded at all at Montreal on his own account and for his own profit solely, or otherwise than in such co-partnership with his brother and Chaplin; that to the Appellant's knowledge the four Castle Bills of Exchange, had no reference to the liquidation of the old firm of Cuvillier & Sons, or to any trade of Maurice Cuvillier's own, but were drawn and accepted for account of A. Cuvillier & Co., and were discounted by the Appellant at New York, in pursuance of a letter of credit signed by Maurice Cuvillier in favor of Castle, he Maurice Cuvillier being throughout, a mere *prête-nom* for A. Cuvillier & Co., and the whole transaction being really theirs'; that (to the like knowledge) the other three Bills of Exchange and the Promissory Note sued upon, were altogether, the affair of A. Cuvillier & Co.; and they, the Defendants pleading, were therefore liable upon none of them.

The third Plea was one of simple denegation.

Issue was joined generally.

Madame Cuvillier's decease was shortly afterwards, suggested; and the Appellant thereupon, desisted from the suit, against her.

The Appellant's case, at *Enquête*, rested upon the Notarial Deed of the 26th July 1849, and upon proof and admissions, in usual form, as to the negotiable paper sued upon, &c.

The Evidence of the Respondents is voluminous.

Among the witnesses produced by Respondents, is Maurice Cuvillier. A motion was made and renewed by Appellant, for the rejection of Maurice Cuvillier's deposition, on the score of interest. This evidence at *Enquête*, was allowed to be taken *de bene esse*, and was not rejected on the merits, but allowed, the motion to reject it, being itself rejected by the final Judgment.

The final Judgment dismisses the Action, upon the principle that the Drafts or Bills of Exchange, sued upon, were discounted by Appellant for the benefit of the firm of A. Cuvillier & Co., of which firm, the said Maurice Cuvillier was a member, and this, to the knowledge of Plaintiff (Appellant) and not discounted for Maurice Cuvillier, in the prosecution of any separate trade or commerce.

I entertain no doubt as to the interpretation to be given to the Deed. It is, in my opinion, a plain question about which a great deal of idle argumentation has been indulged in.

The Deed is simply two-fold, in its motive, viz:

1o. To enable Maurice Cuvillier to liquidate the liabilities of the old firm of D. Cuvillier & Sons.

2o. To enable him (Maurice Cuvillier) to carry on, trade and commerce in Montreal and elsewhere.

Now, unless the Bank of British North America has established, that the discounts obtained by Maurice Cuvillier, were for *himself*, or for the liquidation of the liabilities of the firm of the late D. Cuvillier & Sons, the sureties can't be held bound and responsible. There is no evidence of that. On the contrary, several merchants have proved that it was well known in the commercial circle, that Maurice Cuvillier was a member of the new firm of A. Cuvillier & Co. Why then, did the Bank discount notes to Maurice Cuvillier?

Is it because he signed his name? But Mr. Davidson must have known what every one knows, that as a member of the co-partnership of A. Cuvillier & Co. Maurice Cuvillier was bound by that signature? Why get his name? The natural inference is, that, knowing well the sureties were not bound by the Deed of warranty, for such discounts, he tried and expected to bring them under the operation of the Deed, by means of the *individual* signature of Maurice Cuvillier, which he probably, imagined he could twist into an act of individual trade and commerce. In that attempt, Mr. Davidson has overshot his mark.

I am clearly of opinion, that the whole case reduces itself to a nut shell, and that the Appellant has taken a position which cannot, for a moment, be sustained.

In my view of the case, it becomes useless to discuss the question of the admissibility of Maurice Cuvillier as a witness, he being a party to the record.

I am, upon the whole, of opinion, that this Court should confirm the Judgment of the Superior Court.

CHARLES MONDELET,
A. Q. B.

Montreal, 9th April, 1860.

CANADA.

COURT OF APPEALS.

THE BANK OF BRITISH NORTH AMERICA,
(Plaintiff in the Court below,)
Appellant;

AND

ANG. CUVILLER ET AL.,
(Defendants in the said Court,)
Respondents.

This action was instituted for the recovery of a sum of £4107 12s. cy., with interest, alleged to be due by the Defendants to the Bank in virtue of an *acte de cautionnement* (suretyship) executed before Doucet and his colleague, at Montreal, on the 26th of July 1849. (This Deed is printed in the Transcript, p. 15.)

In this Deed it is stated that the late Austin Cuvillier and his two sons, Maurice and Austin, carried on trade and commerce, at the City of Montreal, on an extensive scale, under the firm of Cuvillier & Sons, until the 11th of July 1849, when the partnership was dissolved by the death of the father, the late Austin Cuvillier. That Maurice uvillier proposed to carry on trade and commerce in the City of Montreal and elsewhere. That to do so, and to meet the engagements of the late firm of Cuvillier & Sons, he would require discounts and pecuniary assistance to a considerable extent from the two Banks, parties to the said Deed, and to secure to the latter the payment of such monies as they might advance to Maurice Cuvillier, the Defendants agreed to make themselves jointly and severally liable for all debts heretofore contracted, or that might be subsequently contracted in favor of the said Banks by the said Maurice Cuvillier, and generally for all the present and future liabilities of the said Maurice Cuvillier towards the said Banks, whether as maker, drawer, indorser or acceptor of negotiable paper or otherwise. (See the whole clause printed in p. 16 of the Transcript.)

The whole question turns upon the interpretation to be put on this clause.

Is the undertaking of the Defendants a general, unlimited guarantee *in omnem causam*, as the Bank contends? or is it a special limited guarantee "*for the causes and purposes plainly set forth in the Deed, and well understood by all the contracting parties?*"

I am of opinion it is the latter; that is, a special, limited guarantee. The parties have put their own interpretation on the Deed.

They declare that Maurice Cuvillier will require pecuniary aid and assistance to meet the engagements of the late firm of Cuvillier & Sons, and to carry on his own business, and to secure the payment of any moneys advanced for *these two* specific purposes, the Defendants hold themselves responsible. It would be a perversion of all language to declare this a guarantee in *omnem causam*. The Defendants have guarded against such an interpretation in the most positive and precise language.

Pothier, in his Traité des Obligations, No. 404, says:—"Lorsque la caution a exprimé pour quelle "somme, ou pour *quelle cause* elle se rendait caution, son obligation ne s'étend qu'à la somme ou à la "*cause* qu'elle a exprimée." Toullier, vol. 6, p. 328, says:—"Quelques généraux que soient les termes "dans lesquels une convention est conçue, elle ne comprend que les choses sur lesquelles les parties "se sont proposé de contracter." In support of this opinion, dictated by plain common sense, Toullier refers to Pothier and Domat.

These rules have met with the approbation of the most distinguished writers on our own law, and will be found not inconsistent with the rules which guide the Courts in England. (See Addison on Contracts, p. 856, last edit.) Pothier, in the same treatise on Obligations, No. 91, lays down the rule: "On doit rechercher qu'elle a été la commune intention des parties contractantes, plus que le sens "grammatical des termes." In No. 96 he says: "Une clause doit s'interpréter par les autres con-"tenues dans le même acte, soit qu'elles précèdent ou qu'elles suivent." (See further No. 98 and 99.) These rules are in strict accordance with those laid down for the interpretation of Contracts, not questioned at this day; they will be found confirmed by the following writers:—Troplong, du Cautionnement, No. 150, says: "Le cautionnement ne s'étend pas d'une personne à une autre. Quand

" je cautionne une société de commerce, je ne suis pas censé cautionner la Société nouvelle qui lui " succéde et prend la suite des affaires." 4 *Pardessus*, "Droit commercial," No. 975.

The present is a much stronger case against the Appellants, as will be shewn by the facts hereinafter mentioned.

But it has been argued that the liability incurred is for all debts. I answer such is not the case. The preamble of a Deed forms a part of the contract, in so far as it makes known the object the contracting parties had in view, and explains their intention.

Toullier, 6th vol. page 354 says: " Le préambule des actes sert également à en interpréter les " clauses et à découvrir l'intention commune des parties?"

The Deed above referred to establishes that the monies were to be advanced by the Bank *for two purposes*."

1st. To enable Maurice Cuvillier to meet the engagements of the late firm of Cuvillier & Sons.

2nd. To enable Maurice Cuvillier to carry on trade and commerce.

By the evidence adduced in this cause, it is clearly proved that the monies advanced by the Bank were so advanced for neither of these *two* purposes.

It is proved that Maurice Cuvillier did not carry on trade and commerce as contemplated by the deed. He had no counting house, no office, no place of business of his own. Not one Montreal merchant could be found who would say he knew Maurice Cuvillier carried on trade; on the contrary, it is fully established that he had no private funds, and that he was employed as principal manager of all the financial business of the firm of A. Cuvillier & Co., attending daily on their premises and at their office from morning until evening.

The evidence of Mr. Davidson, the Manager of the Bank, shows he knew well the monies were not advanced for the purposes mentioned in the Deed. The fact of his *inducing* Maurice Cuvillier to *endorse* the notes and bills of other firms then dealing with the Bank, very clearly indicates that he intended to include these debts in the guarantee, not as the debts of Maurice Cuvillier, the maker or drawer, but as those of Maurice Cuvillier, the *Indorser*, that is, the person whom he himself had induced to guarantee the payment of debts contracted by others, else why resort to the clumsy expedient of making one partner endorse, in his own name, the notes or bills of the co-partnership? To this question Mr. Davidson has given his own answer, by saying, he knew the guarantee did not extend to the debts contracted by these firms.

Further, why was the account of the Firm of A. Cuvillier & Co. kept open in the books of this bank in the name of Maurice Cuvillier? The firm of A. Cuvillier & Co., had got a great deal of accommodation from the bank,—it deposited its moneys there—all was done in the name of Maurice Cuvillier. It would certainly require an unusual degree of boyish credulity to believe that this was not the result of cool calculation.

All knowledge of these proceedings was studiously kept from the Defendants. Had they been made aware of them, would they not instantly have made known their determination of resisting the payment of such demands; saying truly that they agreed to assist their brother, if he continued his trade, but that they never agreed to become answerable for the commercial speculations of men unknown to them.

Had Maurice Cuvillier carried on business in his own name, the Defendants might have protected themselves by inspecting his books at regular intervals, and stopping the business as soon as they found out that the losses by far exceeded the profits.

If the Defendants should be condemned to pay this claim as the sureties of Maurice Cuvillier, *Indorser*, not maker or drawer of the Notes and Bills, would not the creditors of the *joint* estate of A. Cuvillier & Co. claim in preference to the Defendants? Can this be said to be justice to the latter, and that they assumed such a risk?

In weighing these facts we must not forget that all took place under the immediate control of the Manager, not always in accordance with the wishes of the parties,—a gentleman represented by the evidence as one possessed of great information and experience in commercial matters.

The Defendants, therefore, justly say to the Bank: You knew Maurice Cuvillier did not carry on trade and commerce; your own evidence establishes this important fact. You knew Maurice Cuvillier asked from you no advances of money to meet the engagements of the late firm of Cuvillier & Sons. You knew the monies advanced by you, were so advanced, not to Maurice Cuvillier, but to the firm of A. Cuvillier & Co. of Montreal, and to that of Bull & Co. of Belleville. Was not Mr. Davidson, the Manager of your Bank, right when he said the letter of credit was worth nothing *quoad* these advances? I am of opinion he was.

Here it may be proper to notice a statement made, that the Defendants did not, in reality, become answerable for debts contracted in which they had no interest; that the children are the heirs of their late father, and the widow, *commune en biens* with him, at the time of his decease. In answer to this, it will suffice to say, they are not sued as such. We cannot travel out of the record. If we could, we must all say, that *such is not the fact*. The children are not the heirs; the wife is not *commune en biens*.

I will close these remarks by referring to the objections made to the admissibility of Maurice Cuvillier, a co-defendant, as a witness.

This being a case of a commercial nature, we are bound by the rules of Evidence laid down by the laws of England.

On such a question, the Judges in England will not require information from the Judges in Canada. I shall, therefore, be brief, referring, without commentary, to the following authorities:—Warral v. Jones, 7 Bing., 398; 3d. Starkie on Evid., 1063. Any further reference to cases to be found in Phillips, Buller's n.p., and other works, is not deemed necessary.

Although entertaining no doubt on this question, I deem it proper to add that the evidence, without referring to the deposition of Maurice Cuvillier, is, in my opinion, conclusive in favor of the Respondents.

I add a note of English authorities, which will be found to coincide with the views of the French Jurists:—

Collyer on Partnership, § 624: A guaranty given to the *whole* firm, shall not, *primâ facie*, enure to the benefit of the *remaining* partners.

Also, § 625, 628. The reasoning in these and following paragraphs is very applicable to the present case.

Gow on Partnership, pp. 135, and following.

1 vol. of Bell's Com. on the Laws of Scotland, p. 374 (II), and following.

(Signed) J. DUVAL,
J. B. R.

Quebec, 17th April, 1860.

PROVINCE DU CANADA, BAS-CANADA, SAVOIR : } EN LA COUR DU BANC DE LA REINE.

(EN APPEL.)

LA BANQUE DE L'AMÉRIQUE BRITANNIQUE DU NORD,

Appelante.

ET

DAME ANGÉLIQUE CUVILLIER ET VIR, ET AL,

Intimés.

Opinion du Juge en Chef, parlant le dernier, lors de la prononciation du Jugement.

SIR LOUIS H. LA FONTAINE, Bart., Juge en Chef.

L'opinion déjà exprimée par deux des Honorables Juges qui forment la majorité de cette cour, me laisse bien peu à dire.

L'acte de garantie ou de cautionnement dont il s'agit, n'a été consenti que pour deux fins particulières, expressément énoncées dans l'acte, savoir ; Pour aider Maurice Cuvillier: 1o. A satisfaire aux engagements de la ci-devant société "Cuvillier & Sons" ; 2o. à faire commerce en son nom seul ; et non pour aucune autre fin, encore moins, pour le commerce que Maurice Cuvillier prendrait sur lui de faire en société avec d'autres individus.

Il n'y a aucune preuve, de la part de la Banque, appelante, que les avances qu'elle a faites, et dont elle poursuit le recouvrement, aient été par elle faites à Maurice Cuvillier, seul, et surtout qu'elles lui aient été faites exclusivement pour l'une ou l'autre des deux fins énoncées dans le cautionnement. Il lui était impossible de faire une pareille preuve, car elle savait fort bien que ces avances avaient eu lieu pour un tout autre objet, pour le profit et l'intérêt de la nouvelle société "A. Cuvillier & Cie., dont Maurice Cuvillier était membre à la connaissance de la Banque elle-même.

M. David Davidson est le principal témoin de la Banque.

Il a été dit qu'il est doué d'une intelligence peu commune. Il est facile de s'en convaincre à la lecture de ses réponses, mais il n'y a pas d'intelligence qui pouvait y tenir. Après s'être efforcé longtemps à répondre de manière à ne pas admettre qu'il connut l'existence de la nouvelle société, il finit enfin par reconnaître qu'en effet cette nouvelle société existait, qu'il en avait connaissance, et que Maurice Cuvillier ne faisait pas un commerce séparé seul en son nom. Il ne devait pas tant hésiter à faire cette admission, puisque le fait que Maurice Cuvillier était en société avec d'autres individus est établi par trois lettres du mois d'Octobre 1854 produites de la part de la Banque elle-même, (voir cédules Nos. 42, 43 et 44 du Record, pages 37 et 38.) Et cette société est constatée par écrit être celle de A. Cuvillier & Co. par lettre datée de Liverpool 5 Juin 1853, adressée par Holderness & Chilton, à la Banque elle-même, à Montréal, (cédule 45 du Record page 38.) Et c'est l'une des lettres, sur lesquelles la Banque faisait des avances à A. Cuvillier & Cie., tout en prenant en même temps, et de plus, la signature individuelle de Maurice Cuvillier. Comment la Banque peut-elle prétendre aujourd'hui que ces avances n'étaient pas faites à la société ?

La question de l'effet du cautionnement est une question qui doit être décidée par le droit Français exclusivement.

L'acte, qui contient ce cautionnement, doit être interprété favorablement à ceux qui l'ont donné, mais rigoureusement contre ceux au profit desquels il a été donné. Jamais les cautions n'ont eu l'intention de s'obliger pour des avances faites à la nouvelle société "A. Cuvillier & Co." la Banque le savait ou devait le savoir. Cependant toutes ses avances, dont elle poursuit le recouvrement, ont été faites à cette nouvelle société, et exclusivement pour l'intérêt de cette société. La Banque espérait sans doute en tirer de plus grands profits. Elle doit aujourd'hui en subir les conséquences.

(Signé) L. H. LA FONTAINE,
J. en Chef.

Je concours,
(Signé) S. C. MONK,
A. S. J. S. C.
Montréal, 12 Avril 1860.

TRADUCTION.

PROVINCE OF CANADA, LOWER CANADA, TO WIT : } IN THE COURT OF QUEEN'S BENCH.

(APPEAL SIDE.)

THE BANK OF BRITISH NORTH AMERICA,

Appellant.

AND

DAME ANGELIQUE CUVILLIER ET VIR, AND AL,

Respondents.

Opinion of the Chief Justice, who spoke last, on the delivery of the Judgment.

SIR LOUIS H. LA FONTAINE, Bart., Chief Justice.

The opinion already expressed by two of the Honorable Judges, who form a majority of this Court, leaves me little to say.

The *Acte* of guarantee or suretyship in question was made but for two particular purposes, which are expressly set forth in the said Acte, to wit: to aid Maurice Cuvillier: Firstly, to meet the engagements of the late firm of Cuvillier & Sons; Secondly, to carry on trade and commerce in his own individual name, and for no other purpose: much less to carry on trade or business which Maurice Cuvillier might take upon himself to carry on in co-partnership with other individuals.

There is no proof on the part of the Bank, the Appellant, that the advances which it made, and which it seeks to recover were ever made to Maurice Cuvillier alone, and especially, that such advances were made exclusively for one or the other purpose mentioned in the said Act of guarantee or suretyship. It was impossible to make such proof, for it was well known that these advances had been made for a totaly different object, namely for the interest and profit of the new co-partnership of A. Cuvillier & Co. of which Maurice Cuvillier was a member and this to the full knowledge of the Bank itself. Mr. David Davidson is the principal witness on the part of the Bank. It has been stated that that gentleman is gifted with more than common intelligence. Of that fact one is easily convinced by the reading of his answers; but no amount of ingenuity could withstand the truth.

After the most strenuous efforts to answer in such a way as not to be supposed to admit his knowledge of the existence of a new co-partnership, he ended by admitting that, such a co-partnership did exist; that he had a knowledge of the fact, and that Maurice Cuvillier did not carry on commerce separately in his individual name.

He should not have hesitated so much in making this admission, because the fact that Maurice Cuvillier was in co-partnership with other individuals is established by three letters of the month of October 1854, which were produced on the part of the Bank itself (see Schedule Nos. 42, 43 and 44 of the Record, pages 37 and 38.)

The fact of the existence of said co-partnership being that of "A. Cuvillier & Co." is established by a letter dated Liverpool June 5th, 1853, addressed by Messrs. Holderness and Chilton, to the Bank itself at Montreal (see the schedule 45 of the Record page 38.) And this is one of the letters upon which the Bank made advances to A. Cuvillier & Co., taking, besides, at the same time, the individual signature of Maurice Cuvillier.

How can the Bank now pretend that these advances were not made to the said co-partnership?

The question as to the effect of the said Acte of guarantee or suretyship is one which is entirely and exclusively to be determined by the French law. The act which contains the suretyship must be interpreted favorably to those who gave it, but rigidly against those for whose profit it was given.

The sureities never had the intention of obliging themselves for advances made to the new firm of "A. Cuvillier & Co."; the Bank was aware or should have been aware of this fact.

Yet all the advances for the recovery of which the Bank is now prosecuting were made to the said new firm of A. Cuvillier & Co. and for its exclusive benefit.

The Bank hoped, no doubt, to derive greater profits from such a course.

It must to day stand all the consequences of its conduct.

(Signed.) L. H. LA FONTAINE,
Chief Justice.

I concur,
(Signed) S. C. MONK, A. S. J., S. C.
Montreal 19 April, 1860.